

1 And on this issue of discrimination, there is a
2 dearth of information or evidence to suggest that you there is
3 intentional discriminatory conduct in the record.

4 Part of the problem here is that this is brought as a
5 motion for preliminary injunction -- which is extraordinary
6 relief, when granted -- is that counsel, when moving as quickly
7 as they did, did not have the opportunity to do reasonable
8 discovery.

9 We have some documents, obviously, in the record.

10 But this was brought on an emergency basis, and
11 counsel have moved very quickly.

12 Now, it may well be, along the way, that the
13 plaintiff will move to amend its complaint -- and that motion
14 would likely be granted -- to make the kinds of allegations
15 that are required in order to establish municipal liability
16 under 1983, or to make a better case in terms of equal
17 protection under the law.

18 But in its present form, and based upon all of the
19 submissions, and having heard the arguments of counsel, I am
20 going to deny the motion for the reasons that I have just
21 indicated.

22 However -- and this is a big "however" -- motions for
23 preliminary injunction can be refiled. A motion for
24 preliminary injunction is simply that, it is preliminary.

25 There can be other such motions.

1 And at this juncture, I don't believe that Aurora has
2 actually answered the complaint, is that right?

3 MR. MALINA: That is correct.

4 THE COURT: You have not answered.

5 And the general rule is to answer or otherwise plead
6 within 20 days of the filing of the core complaint, and so
7 there is still time.

8 The law also, in terms of procedure under Federal
9 Rule of Civil Procedure 26, requires initial disclosures, and
10 both sides have the right to proceed routinely with discovery.

11 So by no means is this case over. By no means.

12 I should add this: that it is not the function of
13 the Court to take a position regarding the judgments that have
14 been made by the parties in this case.

15 The record speaks for itself on that point.

16 This Court should not second-guess what the mayor has
17 decided to do, with the advice of the Council or agreement of
18 the Council in terms of external investigations. That is not
19 an issue this Court is deciding.

20 There is a delay, but the delay itself at this point
21 is not of constitutional magnitude.

22 That, obviously, could change.

23 And as we discussed very, very early on, the first
24 time you were before the Court, I believe, there was a question
25 of whether the refusal to issue appropriate permits and

1 documents could ultimately involve a taking.

2 That issue certainly has not been fully developed.

3 And I should hope we never get to it.

4 But, in any event, all I'm deciding today is the
5 motion for preliminary injunction.

6 Beyond this, all parties should proceed routinely
7 consistent with the rules.

8 It is so ordered. Thank you, counsel.

9 (Proceedings concluded.)

10 CERTIFICATE

11 I hereby certify that the foregoing is a true and
12 correct transcript of the proceedings in the above-entitled
13 case.

14 
15 Maellen E. Pittman

16 _____
17 _____
18 _____
19 _____
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21 _____
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25 _____

12-6-07
Date

EXHIBIT K

001528

Maellen E. Pittman, U.S. Court Reporter

1 IN THE UNITED STATES DISTRICT COURT
2 NORTHERN DISTRICT OF ILLINOIS
3 EASTERN DIVISION4 PLANNED PARENTHOOD CHICAGO)
5 AREA, an Illinois non-profit)
6 Corporation, and Gemini Office) 07 C 5181
7 Development LLC, an Illinois)
8 limited liability company,)
9 Plaintiffs,) September 20, 2007
10 vs.) Chicago, Illinois
11) 10:00 a.m.
12 CITY OF AURORA, ILLINOIS,)
13 Defendant.)14 TRANSCRIPT OF PROCEEDINGS
15 BEFORE THE HONORABLE CHARLES R. NORGLER, SR.

16 APPEARANCES:

17 For the Plaintiffs: PERKINS COIE LLC
18 131 South Dearborn Street
19 Suite 1700
20 Chicago, Illinois 60603-5559
21 BY: MR. CHRISTOPHER B. WILSON
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 BY: MR. LANCE C. MALINA
 MR. ALLEN WALL
 (312) 984-640026 Court Reporter: MAELLEN E. PITTMAN
27 Official Court Reporter
28 219 South Dearborn Street
29 Room 2342
 Chicago, Illinois 60604
 (312) 435-5576

1 (Proceedings heard in open court:)

2 THE CLERK: 07 C 5181, Planned Parenthood Chicago
3 Area versus the City of Aurora.

4 MR. WILSON: Good morning, your Honor.

5 Chris Wilson for Planned Parenthood. I apologize for
6 the confusion this morning.

7 THE COURT: Good morning, counsel.

8 What is the issue?

9 MR. WILSON: The issue is that we are seeking an
10 injunction.

11 THE COURT: I don't mean the merits of the case. I
12 mean the failure of the opposing counsel to appear.

13 MR. WILSON: Neither of us were aware that you would
14 take us at 10:00 o'clock today.

15 THE COURT: I think when we left it Friday, that was
16 everybody's understanding: that if Judge Kendall did not deal
17 with this case, that it would be returned to this court and
18 that we would proceed.

19 I am ready to proceed, if you are.

20 MR. WILSON: We are absolutely ready to proceed. He
21 should be here in the next ten minutes, and we will proceed.

22 THE COURT: We will pass the case. 15 minutes.

23 MR. WILSON: Thank you very much, your Honor. I
24 apologize.

25 THE COURT: Thank you, counsel.

1 (Recess.)

2 THE CLERK: 07 C 5181, Planned Parenthood versus City
3 of Aurora.

4 MR. WILSON: Good morning, your Honor.

5 Chris Wilson on behalf of Planned Parenthood Chicago
6 Area and Gemini Office Development.

7 THE COURT: Good morning, counsel.

8 MR. MALINA: Good morning, your Honor.

9 I am Lance Malina, here on behalf of the City of
10 Aurora.

11 THE COURT: Good morning, counsel.

12 How does the matter come before the Court?

13 MR. WILSON: The matter is here, your Honor, for
14 preliminary injunction.

15 We are seeking an injunction barring the City of
16 Aurora from interfering with our ability to open for business
17 as scheduled on September 18th.

18 We received a temporary occupancy permit from the
19 City of Aurora, and there were two conditions upon that
20 temporary occupancy permit.

21 We have met both of those conditions.

22 Since the issuance of that temporary occupancy permit
23 there has been a firestorm of political opposition to the fact
24 that Planned Parenthood provides abortion services: there have
25 been protests, there have been marches, there have been

1 demonstrations and commentary in front of the City Council.

2 And in response to that, they have initiated an
3 independent review that is unprecedented. And we submit that
4 the only reason for that independent review is because of the
5 fact we provide constitutionally protected abortion services.

6 And that is simply an obstacle in the way, in the
7 path of the constitutionally protected right. That is
8 impermissible.

9 For that reason, we are seeking an injunction from
10 your Honor.

11 If I could, I'd like to briefly review the facts and
12 present to you the standards that we meet for preliminary
13 injunction.

14 THE COURT: I have read the pleadings.

15 What is your immediate response, counsel?

16 MR. MALINA: Judge, my immediate response is this
17 morning we filed a Rule 12(b)(1) motion to dismiss for lack of
18 subject matter jurisdiction.

19 We did not notice --

20 THE COURT: When did you file that?

21 MR. MALINA: Within the last hour.

22 THE COURT: Do I have a copy of it?

23 MR. MALINA: I have a copy here, Judge.

24 My associate came over -- see, I didn't know you were
25 going to hear this this morning until about ten minutes ago. I

1 was waiting for a call from opposing counsel or from your
2 chambers, and --

3 THE COURT: So you have raised a jurisdictional
4 issue?

5 MR. MALINA: I do.

6 THE COURT: Do you have an extra copy?

7 MR. MALINA: Yes, Judge. And I apologize for --

8 THE COURT: Mr. Wilson, have you seen a copy of this?

9 MR. WILSON: I just read it as we were sitting here,
10 your Honor.

11 THE COURT: Certainly you should take a couple of
12 minutes to read it as well.

13 Is that all it will take, just a couple of minutes?

14 MR. MALINA: Yes. About seven pages.

15 THE COURT: All right. I'll be back in about seven
16 minutes.

17 (Recess.)

18 THE COURT: Call the case again, please.

19 THE CLERK: 07 C 1581, Planned Parenthood versus City
20 of Aurora. 5181.

21 THE COURT: Mr. Wilson, have you had an opportunity
22 to read the pleading?

23 MR. WILSON: Yes, I have had.

24 THE COURT: Are you prepared to respond?

25 MR. WILSON: Yes, I am, your Honor.

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1 THE COURT: All right. The -- one of the questions
2 here is whether -- for Williamson purposes -- is whether Gemini
3 or Planned Parenthood are making a claim of a taking in terms
4 of the Fifth Amendment.

5 Is that one of your claims?

6 MR. WILSON: We have not asserted property rights
7 claims at this point.

8 We are simply asserting a 1983 claim for violation of
9 our rights under the Constitution.

10 THE COURT: Yes. But a part of what you are pleading
11 is that if the City of Aurora does not act expeditiously --
12 although you haven't said this directly -- the inference is
13 that there would be a taking. And if Aurora did not issue the
14 occupancy permit for 30 days or 30 years, certainly there would
15 be a taking in that respect because you couldn't function.

16 MR. WILSON: Yes, that is correct, your Honor.

17 THE COURT: But you haven't directly alleged a
18 taking.

19 MR. WILSON: No, we have not.

20 Well, what we have alleged is that because of the
21 actions of the City of Aurora in reversing and modifying the
22 occupancy permit, we have been denied the ability to provide
23 services, we have been denied the ability to earn revenue, we
24 have been denied the opportunity to realize our property.

25 So, yes, in fairness, we are asserting a property

1 claim as well.

2 THE COURT: Well, you are unable to use the property.

3 MR. WILSON: We are absolutely unable to use that.

4 THE COURT: Your claim alleges that this area is
5 zoned to permit the construction and utilization of a medical
6 facility. So it's not a zoning issue.

7 MR. WILSON: Absolutely not a zoning issue.

8 THE COURT: It is an issue of the occupancy, the
9 certificate.

10 But by virtue of not issuing it, now I think you are
11 saying -- if you did not in your complaint originally -- argue
12 that there is a taking in that sense.

13 MR. WILSON: Yes.

14 I mean, for purposes of this presentation today, I'm
15 willing to submit that we will be submitting a property claim,
16 as well as the denial of our constitutional rights.

17 THE COURT: Now, that takes us to the Williamson
18 case, which is alleged by Aurora to be applicable under these
19 circumstances. Have I stated your argument appropriately?

20 MR. MALINA: Yes, Judge. That is our argument. It
21 is a property use case.

22 THE COURT: Well, the role --

23 MR. MALINA: Counsel -- I'm sorry.

24 THE COURT: Just a minute.

25 What is your position, then, in terms of the

1 application of the Williamson case, which is a Supreme Court
2 case?

3 MR. MALINA: Exactly. The Williamson case, and also
4 the Seventh Circuit case that applies that same ripeness
5 doctrine in an equal protection context --

6 THE COURT: Well, let's slow this up.

7 This is a case of equal protection, according to the
8 plaintiff, right?

9 MR. MALINA: That is correct.

10 THE COURT: That's what they allege. Equal
11 protection of laws.

12 MR. MALINA: Right. Because they want to plead this
13 case so that it appears to be a denial or restriction of
14 abortion rights under the Fourth Amendment.

15 But it's really, from their perspective, a land use
16 case, it's a property case. Because their right to privacy
17 under the Fourth and Fourteenth Amendment is unaffected by what
18 the City is doing here.

19 This is a land use case. They can't open because we
20 are going to conduct an independent review. The City wants to
21 look at the procedures followed because of an allegation
22 raised.

23 THE COURT: The complaint, however, is brought
24 pursuant to 1983, a civil rights action, based upon equal
25 protection of the laws.

1 And it does not directly or formally take us to the
2 Fifth Amendment taking aspect of the case. Although
3 inferentially, as I have said, it may be there.

4 MR. MALINA: Yes.

5 THE COURT: And that is your position.

6 Although it's not pleaded specifically, you are
7 saying that's the effect; therefore, Williamson should apply.

8 MR. MALINA: Exactly.

9 And their claim of harm raises it directly, because
10 they are saying they have scheduled appointments. In other
11 words, their business will be affected if they can't -- it will
12 be harmed.

13 And if we get that far, it's our position that,
14 therefore, they have alleged they have an adequate remedy at
15 law because they are going to be out the cost of those
16 appointments.

17 THE COURT: What is your reply, counsel?

18 MR. WILSON: Your Honor, you have identified it with
19 your questions.

20 This is -- there are many parts of this case, but at
21 its core it's an equal property claim and a civil rights claim,
22 and it is absolutely ripe for determination. Because the City
23 has singled out Planned Parenthood for differential treatment
24 by denying its occupancy permit.

25 And the only basis is the objection by some in the

1 community to the provision of abortion services.

2 Because of that, we are getting special review, we're
3 getting special scrutiny. And it simply is not permitted.

4 And so this case is absolutely ripe.

5 What should happen today, your Honor -- and I'm sure
6 we'll spend a lot of time getting into it -- is that an
7 injunction should allow us to open and allow to us conduct our
8 business.

9 If they have a review process that finds some reason
10 why it should not have been issued, then we can address that at
11 this point.

12 But right now they are harming us in a
13 constitutionally protected service.

14 MR. MALINA: May I respond, Judge?

15 THE COURT: Yes.

16 MR. MALINA: If you order the City to allow them to
17 open, and there is a zoning review, and there is a subsequent
18 attempt by the City to say "this was done improperly," or
19 "you're going to need to do this over again," this federal
20 court is going to be sitting as a zoning court the way a state
21 court in Kane County would be sitting, and it's just
22 inappropriate.

23 We haven't reached that point yet. We haven't denied
24 their occupancy permit. They have a temporary, they were
25 allowed to move in, they are going to be delayed because of an

1 investigation. The City has not reached a decision.

2 The fact that there were protests, and so forth, the
3 City cannot change any of that. There is a thing called the
4 First Amendment. People have a political right to present
5 their view.

6 The fact that the City listened to those views
7 doesn't mean that the City has some motive automatically in
8 order to deny the right that the U.S. Supreme Court has held of
9 abortion rights under the Fourth and Fourteenth amendments.

10 THE COURT: You've got to return to the Williamson
11 aspect of the case.

12 What Williamson says, basically, is that before the
13 Court should entertain the 1983 action in a case where there is
14 a taking allegation, that, first, the taking allegation should
15 be decided because it may well be that the plaintiffs would get
16 the relief that they are seeking, and, therefore, there would
17 be no need to proceed to a 1983 action.

18 MR. MALINA: That's one of the components, yes.

19 THE COURT: All right. So which is to say that if by
20 noon today, for example, that the occupancy permit were issued
21 without qualifications, that Planned Parenthood probably would
22 not proceed with a 1983 action.

23 The issue might, therefore, become moot, unless there
24 were some claim of damages that could be argued as a result of
25 delay.

1 Is that right?

2 MR. WILSON: Not quite, your Honor. Because what we
3 are facing is an inability to open absent an injunction of this
4 Court.

5 They have told us they have no intention of allowing
6 us to open before September 18th. We have a letter dated
7 September 11th saying: "We have no intention." It's Exhibit 7
8 to the --

9 THE COURT: Yes. It's attached to your complaint and
10 I have read it.

11 MR. WILSON: So we are facing absolute, imminent
12 harm, and they have made the determination that they are
13 imposing an entirely different process on us because of our
14 provision of abortion services.

15 If I could just read one line from the case of
16 Manchester, which addressed this directly, it says: "It is
17 enough for the complaining parties, Planned Parenthood, to show
18 that the local officials are effectuating the discriminatory
19 designs of private individuals."

20 The opponents of Planned Parenthood have raised
21 objections. They have been followed by the City Council and
22 the other authorities at the City of Aurora.

23 And they are imposing an entirely different review
24 process than what they put in their certificate of occupancy in
25 response to political demands.

1 And that is not permitted under the Constitution, and
2 that's the hardship that we are --

3 THE COURT: Are you saying that public officials
4 cannot respond to legitimate public protests?

5 MR. WILSON: They can. The big term there, your
6 Honor, is "legitimate."

7 This was --

8 THE COURT: Well, that wasn't accidental that I put
9 that in there.

10 MR. WILSON: Right. They are entitled to respond to
11 legitimate concerns.

12 They are not entitled to put extra obstacles to
13 abortion services because of political objections.

14 That is a constitutionally protected right.

15 THE COURT: But that is an inference that you have
16 reached.

17 There is no evidence to support your position, at the
18 moment, that individuals are -- those decisionmakers have their
19 own personal reasons for voting as they did or for writing the
20 letter and using the language that they did.

21 So that's something we may get to.

22 But your request for relief in the preliminary
23 injunction can be separated at this point ultimately from the
24 Williamson issue.

25 I think there is at least enough here to proceed with

1 the preliminary injunction while the issue of Williamson can
2 still be developed by counsel.

3 There are many, many views of Williamson.

4 And you have put a substantial quote from Williamson
5 in your motion to dismiss the plaintiffs' complaint for
6 preliminary injunction.

7 So I'm going to deny the motion to dismiss the motion
8 for preliminary injunction, but while you can still preserve
9 that issue, when and if we get to the substance of the
10 complaint, over a period of time.

11 But back to the prayer for relief in the preliminary
12 injunction.

13 The plaintiffs state on page 7 that "The Court enter
14 judgment against Aurora, and find that Aurora has violated
15 plaintiffs' rights to equal protection under the law by
16 attempting to modify the certificate of occupancy and
17 compliance, thereby preventing plaintiffs from opening the
18 facility on September 18th, 2007."

19 And then in the second paragraph you're asking that
20 Aurora be enjoined and restrained from modifying the
21 certificate of occupancy and compliance, and preventing
22 plaintiffs from opening the facility as planned on September
23 18th, 2007.

24 Without some kind of a hearing, or some evidence,
25 what is there before the Court that would justify telling the

1 local authority that they cannot attempt to modify something?

2 Now, is it not a legitimate exercise of discretion,
3 that when public officials hear objections or protests from all
4 sides, that they can step back and say: "We will look at this
5 again," or "Review what we have done"?

6 Isn't that a legitimate exercise of discretion by
7 public officials?

8 MR. WILSON: It can be, your Honor.

9 And some examples I have thought about: If a
10 restaurant obtained a permit and the City thought that it was a
11 mom and pop blue-plate diner and it was actually a national
12 chain, and there was something in the zoning code barring
13 national chains. Or if it was a bookstore, and they found that
14 it actually was an adult book store and violated the zoning
15 code.

16 Those types of examples may be situations where they
17 could have a review.

18 Here the only new fact -- and, your Honor, we allege
19 that those facts are not new, they were well-known -- but let's
20 assume for purposes of argument that they were not aware that
21 this was a Planned Parenthood facility.

22 They knew it was a medical facility, they knew it was
23 an outpatient facility, they knew it was providing surgical
24 services.

25 The only new fact is that it was providing abortion

1 services as part of a broad range of conception and
2 gynecological services, that is simply not a permitted basis to
3 go back and submit us to additional review.

4 The objections of people to abortion services, while
5 well-held and certainly strongly held, is not a basis for
6 denying us a permit.

7 It's singling out abortion services --

8 THE COURT: Yes, but you leap to the conclusion that
9 that is the basis. And, certainly, it is not established in
10 the record -- perhaps you may be able to do that -- but in
11 terms of your submission there is nothing to support that
12 that's what they have done.

13 MR. WILSON: But, your Honor, I think counsel would
14 stipulate that that is why they are looking at this so
15 specially, is the objection to abortion services.

16 There is no other objection in the record in any way,
17 other than the outcry over the fact that we provide abortion
18 services.

19 THE COURT: Okay. What is your response, counsel?

20 MR. MALINA: I won't stipulate to that. I mean, not
21 as it's phrased.

22 I think that the City -- the fact that this
23 development provided abortion services provides one component.
24 Some people objected because they don't want abortion to be
25 legal or constitutionally protected.

1 But from the City's perspective there is a zoning
2 interest in the property. This isn't a straight zoning
3 district case. This is a planned development district.

4 And this isn't a situation where they just applied
5 for a building permit that showed a footprint and got it.

6 The developer, Gemini, had to appear before a
7 committee of the City, and they were asked certain questions
8 and certain answers were given.

9 The allegations were that those answers were --
10 omitted material facts that related to who the developer really
11 was.

12 Now, the City's interest in public health and safety,
13 as it relates to --

14 THE COURT: Let me press that point. You are saying
15 that there were material omissions from the application.

16 MR. MALINA: Actually, I'm not. I'm saying that's
17 what the investigation is looking into.

18 THE COURT: Whether there were material omissions or
19 misrepresentations.

20 MR. MALINA: Whether there were omissions, and
21 whether they were material.

22 THE COURT: And that is the reason, at least you
23 argue, and not mere pretext with respect to abortion or right
24 to life.

25 MR. MALINA: Right.

1 THE COURT: Or all of the above.

2 MR. MALINA: And I'm not saying what the outcome is
3 either. I'm not saying the City has taken a position one way
4 or another, but it's investigating into that -- it's
5 investigating that process.

6 THE COURT: Now, the duration of the investigation is
7 another thing that we touched on in terms of Williamson, which
8 could be, of course, a taking if they were to wait a year to
9 make a decision.

10 On the other hand, the review could take place in a
11 day or a week or some other reasonable period of time, could it
12 not?

13 MR. MALINA: Yes. And that is, in fact, the goal of
14 the City.

15 THE COURT: So what the injunction asks the Federal
16 Court to do is to enjoin Aurora from attempting to modify
17 something; to have a federal judge tell Aurora that "You cannot
18 attempt to modify."

19 MR. WILSON: That's correct. That's what it says.

20 THE COURT: That's what you are asking the Court to
21 do.

22 MR. WILSON: Not only are we asking you to do that,
23 your Honor, but in other circumstances identical to these --
24 Planned Parenthood asked to do this -- and they have taken much
25 broader action than what we are asking you to do in regards to

1 Aurora.

2 In fact, they have ordered variances to be given in
3 the New Hampshire case. They have ordered facilities to be
4 given exceptions to the zoning code.

5 THE COURT: Without discovery? Without evidentiary
6 hearings? Without hearing witnesses?

7 THE WILSON: In the Manchester case it was a hearing
8 just like this with submissions of counsel.

9 THE COURT: Well, this is hardly a hearing. This is
10 more of an argument.

11 When I'm speaking of a hearing, I have in mind the
12 calling of witnesses and the presentation of evidence and
13 documents, and so on.

14 MR. WILSON: But to answer your question, your Honor,
15 yes, it was a presentation by counsel based on the affidavits
16 just like this.

17 And if I could, I just wanted to --

18 THE COURT: Well, what affidavits? Have you attached
19 affidavits of anybody who is functioning on behalf of Aurora in
20 making the decision process?

21 MR. WILSON: I have not, and here is why, your Honor
22 --

23 THE COURT: Well, have you submitted any affidavits
24 of anyone? Anyone? Who?

25 MR. WILSON: We submitted a lengthy affidavit of the

1 president of Planned Parenthood Chicago Area and the --

2 THE COURT: Just one affidavit of the president.

3 MR. WILSON: Correct.

4 THE COURT: No other --

5 MR. WILSON: An affidavit of the president.

6 THE COURT: No other affidavits from any other person
7 involved in the practicalities of making the decision.

8 MR. WILSON: If your Honor would like more
9 affidavits, we would be glad to provide them. But we think all
10 the facts --

11 THE COURT: Well, I'm not saying I'm asking for them.
12 I'm asking you what you have provided.

13 MR. WILSON: We provided one affidavit of Steve
14 Trombley.

15 THE COURT: Is it in the nature of a 30(b)(6)
16 witness?

17 MR. WILSON: Fair enough.

18 If I could, your Honor, though, the question is: Was
19 there a material representation? That's what this independent
20 review is.

21 And let me just present to you, this isn't the first
22 time this has come up. This is exactly what happened in the
23 Manchester case. And the only material misrepresentation at
24 issue here is whether or not we disclosed we were Planned
25 Parenthood.

1 THE COURT: You are suggesting that that's the result
2 of the investigation. That is the only material
3 misrepresentation.

4 What -- as I understand what the pleadings suggest
5 here is that Aurora has said: "We are going to step back and
6 look at this."

7 As I said, it may well be that the result of the
8 investigation, if one is to go forward, would be favorable to
9 and Planned Parenthood and Gemini.

10 MR. WILSON: We expect that it will be.

11 The problem is, while that's going on, we can't treat
12 patients, we can't open for business, we can't help the people
13 of DuPage, Kane, Kendall and Will counties.

14 THE COURT: Once again, to return to your motion,
15 it's to say to the Court to stop Aurora from attempting to
16 modify.

17 There is no support for the idea that the
18 modification could be disfavorable to the plaintiffs, for
19 example.

20 MR. WILSON: Your Honor, if it's a question of the
21 scope of the objection, we can address that. But what I'd like
22 to demonstrate first is we have an absolute likelihood of
23 success on the merits. We have presented a 1983 claim that
24 they are interfering with abortion rights. And there is no
25 question that we can prove that case.

1 Second, the question of irreparable harm, first of
2 all, is assumed a constitutional case, but here it's tangible:

3 Patients will not get services tomorrow morning
4 absent an order of this Court.

5 Third, Planned Parenthood, like any business, needs
6 to have its doors open, and we're being unconstitutionally
7 interfered with by the City of Aurora.

8 Third, the balance of the hardships --

9 THE COURT: The interference that you are arguing
10 here, as I understand it, is a continuing investigation to look
11 back at the process that was followed in getting the occupancy
12 permit, the temporary occupancy permit.

13 That you are objecting to the review of that
14 procedure.

15 MR. WILSON: We're not. It's a very, very important
16 difference here, your Honor, which is we are objecting to the
17 interference with our business while they go through with this
18 ad hoc new review.

19 This is not -- first of all, this is not something
20 the City of Aurora normally does. It's been created for
21 Planned Parenthood.

22 But, second, we have put in the requested order that
23 we don't want interference with our lawful operations.

24 If there is a citation, if we are doing something
25 wrong, if we're draining our waste water in a bad way, if we're

1 otherwise not complying with the City of Aurora, they have
2 every right to issue a citation and to close our business.

3 I assume we will be complying with that, and they
4 will not be doing that.

5 What they don't have a right to do, your Honor, is to
6 arbitrarily and unreasonably shut down our business.

7 THE COURT: You're saying "unreasonably" and
8 "arbitrarily."

9 MR. WILSON: It is --

10 THE COURT: First, they haven't shut down anything
11 yet because, obviously, you're not functioning, but you might
12 be tomorrow.

13 MR. WILSON: I'm sorry to interrupt, your Honor, but
14 they have told us categorically: "We have no intention of
15 allowing you to open for business."

16 THE COURT: That's what the letter says.

17 MR. WILSON: And that's what they're doing.

18 THE COURT: But are you saying that no delay is
19 tolerable? That if this investigation were to take a day or
20 two days or three days, that that would be intolerable?

21 MR. WILSON: Well, I think the fair thing, your
22 Honor, is to allow us to open, to permit the injunction to go
23 forward, and if the process goes forward correctly and we are
24 allowed to continue, then we will continue. There will be no
25 harm to us.

1 That's the thing about an injunction. You need to
2 balance the hardships.

3 THE COURT: Of course.

4 MR. WILSON: The hardship to us is we can't work.

5 The hardship to them is nothing. They just go
6 through with their process. There is no harm if the clinic is
7 open for a few days and then they find out there is a
8 violation. There is no harm to that; none whatsoever.

9 From the other side --

10 THE COURT: It depends on the violation.

11 MR. WILSON: The violation here is were there
12 material misrepresentations, as I understand it.

13 THE COURT: Is that the issue? Is that what it gets
14 down to, material misrepresentations?

15 MR. MALINA: The City is investigating the whole
16 process of the application, down through the present of this
17 application, to make sure that everything was done according to
18 Code, and that it complies completely with Code.

19 I can't tell you what -- I'm not even involved in it.

20 THE COURT: So are you suggesting that the City of
21 Aurora rushed to judgment when issuing the temporary permit in
22 the first instance?

23 MR. MALINA: No. Here is the --

24 THE COURT: What was unusual then about the process?

25 MR. MALINA: The temporary certificate of occupancy

1 was issued so they could start moving in.

2 Allegations were raised about these
3 misrepresentations. The City of Aurora decided to do an
4 independent review of the process to determine whether its own
5 codes were followed properly, and they said that in the interim
6 they would not be allowed to open without a certificate of
7 occupancy.

8 They don't have a certificate of occupancy, they have
9 a temporary in order to move in.

10 The City of Aurora --

11 THE COURT: That is to say, to move in but not
12 operate?

13 MR. MALINA: To conduct business.

14 And they indicated to the City that they had an
15 expectation to open September 18th, and the City was aware of
16 that.

17 THE COURT: Is that in the record somewhere?

18 MR. MALINA: I don't know.

19 But the point --

20 THE COURT: Well, who knows?

21 MR. WILSON: Actually -- I'm sorry to interrupt, your
22 Honor -- in Exhibit 6 it does indicate, a letter from the City,
23 that they expected us to open on the 18th. They have
24 acknowledged that publicly.

25 THE COURT: But there have been public hearings, have

1 there not, in the routine process?

2 MR. MALINA: Yes. There was a hearing before the
3 Planning and Zoning Committee of the City Council.

4 THE COURT: What was the action of the Committee with
5 respect to the issuance of the permit?

6 MR. MALINA: Oh, that --

7 THE COURT: Now, is this the City acting, or just the
8 Committee acting?

9 MR. MALINA: The temporary occupancy permit was
10 issued by the building department of the City of Aurora.

11 THE COURT: All right. And the final decision would
12 be made by whom?

13 MR. MALINA: The Building Department of the City of
14 Aurora. But the City Council -- well, actually, because this
15 is a planned district development, the City Council also has a
16 way of considering a recommendation for approval, and that, our
17 position is, what's happening.

18 THE COURT: And that ultimately the mayor would sign,
19 right?

20 After the Council acts, looking at the recommendation
21 of the Zoning Building Committee, after the Council itself
22 acts, ultimately the mayor would have to sign, right?

23 MR. MALINA: In this case. In this case that could
24 very well be.

25 THE COURT: How is this case different from any other

1 case of major development?

2 MR. MALINA: Well, because the City doesn't -- I
3 mean, counsel is correct: The City does not investigate every
4 single action by staff, although it's part of the City Code
5 that it can, and it does from time to time.

6 And there also is a right of appeal by the City
7 Council for approvals of final plans in this planned
8 development district.

9 THE COURT: And so that may take us back, ultimately,
10 to Williamson.

11 Because what you're suggesting here is that the
12 ultimate result may provide all the relief that the plaintiff
13 seeks; that ultimately all of this would go forward.

14 MR. MALINA: Right. Our position is we haven't
15 decided yet and we'd like to be able to decide.

16 THE COURT: All right. And, therefore, there is no
17 case or controversy as you see it. It's not ripe for
18 disposition.

19 MR. MALINA: That is our position.

20 THE COURT: All that would be a sound argument but
21 for the preliminary injunction before the Court.

22 MR. MALINA: Well, the preliminary injunction is
23 based on the complaint. Your preliminary injunction is only as
24 good as your cause of action.

25 THE COURT: Well, no. The injunction just shows a

1 likelihood of success on the merits.

2 You agree to that, don't you?

3 MR. MALINA: I do. But if the motion is well-taken
4 there can be no likelihood.

5 I mean, in other words, the complaint itself has to
6 state a ripe cause of action. And it's not just Williamson,
7 it's also the Seventh Circuit case that deals with the issue in
8 an equal protection context, Patel versus City of Chicago.

9 So, you know, our position is that we haven't denied
10 them their certificate of occupancy.

11 The City routinely makes developers wait while they
12 -- maybe they don't get to a final inspection on the date that
13 the developer wanted, and that's what happens.

14 The City completes its review, and then it gives a
15 decision. And then if the developer doesn't like the decision,
16 they go in on a writ of mandamus or other appropriate
17 injunctive in the State Court.

18 We haven't even made a decision here.

19 MR. WILSON: Your Honor, the fundamental difference
20 here is we are talking about a constitutionally protected
21 service, that is what, we submit, is the reason why we are
22 being treated differently. And that's why our 1983 cause of
23 action is very likely to succeed on the merits.

24 THE COURT: Yes. That is what you argue. That is
25 what you argue.